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A Survey of Attorney-Client Privilege in Joint Defense

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Slowly, courts are clarifying the scope of the attorney-client privilege that arises when codefendants or potential codefendants cooperate in a joint defensive effort. This article surveys the progress of the law and raises questions about the impact of cross-claims.

I. INTRODUCTION

Fundamental differences over the concepts of privilege and federalism caused Congress to reject Proposed Federal Rules of Evidence (FRE) 501-513[1] and to compose present Federal Rule of Evidence 501,[2] which leaves the law in the same confused state.

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1. Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates, 51 F.R.D. 315, 356-83 (1971) [hereinafter cited as Proposed Rules].

Numerous criticisms were directed at these proposed rules. Congress rejected the Advisory Committee's basic assumption that the importance of ascertaining the truth in the courtroom outweighs the social value served by privileges. Some opponents of the proposed rules pointed out the value that privileges serve by promoting truth outside the courtroom through the fostering of confidences. Others questioned whether the adoption of such rules of substance was within the Supreme Court's power under the enabling acts granting the right to prescribe rules of practice and procedure. Still other critics attacked the proposed rules as an unconstitutional abridgement of state-created substantive rights. Still other opponents characterized the proposed rules (particularly rule 501, which allowed courts to honor state privileges) as being at odds with our system of federalism and as putting a freeze on the law of privileges in the federal courts, which had previously encouraged flexibility. 2 J. WEINSTEIN, EVIDENCE ¶ 501[01], at 501-12 to -15 (1980).

2. FED. R. EVID. 501.

The gravamen of the congressional disagreement was the dichotomy between substance and procedure, the legacy of *Erie Railroad v. Tompkins*.[3]

The proponents of "privilege-as-substance" point to the impact that privileges have outside the courtroom. According to this view, privileges result from efforts to further certain values our society prefers over its desire to expose the whole truth in the courtroom. These preferred values rest upon assumptions that certain human behavior (such as openness with attorneys) is desirable; society encourages this behavior by providing protection from the truth-seeking machinery of litigation.[4] Some commentators would base these privileges on the right to personal privacy and the individual's interest in freedom of expression.[5]

On the other hand, the "privilege-as-procedure" coterie argues that what is most important about the rules of privilege is the way they alter the normal mode of proof in a trial.[6] Although a privilege may embody state social policies and affect conduct outside the courtroom, inside the courtroom it merely affects the procedural functioning of the system by keeping relevant and otherwise admissible evidence from the trier of fact.[7]

Because assumptions about human behavior are inescapable, so are privileges. The balance of this paper will proceed on the premise that the attorney-client privilege is here to stay, and will explore the logical extensions of one aspect of the privilege.

II. Evolution of the Doctrine

Wigmore propounded the traditional conditions for all confidential communications and recognized the tensions over the dichotomy of substance and procedure that were later to worry Congress. Only communications meeting his stringent conditions, he

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3. 304 U.S. 64 (1938).

4. Pedersen, *Federal, State Privilege Proposals Compared*, 53 Neb. L. Rev. 373 (1974).

5. *See, e.g.*, Krattenmaker, *Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence*, 62 Geo. L.J. 61, 85 (1973).

6. Advisory Committee Note to Evidence Rule 501, 56 F.R.D. 230, 233 (1972).

> The reality of the matter is that privilege is called into operation, not when the relation giving rise to the privilege is being litigated, but when the litigation involves something substantively devoid of relation to the privilege. The appearance of privilege in the case is quite by accident, and its effect is to block off the tribunal from a source of information. Thus its real impact is on the method of proof in the case, and in comparison any substantive aspect appears tenuous.

Id.

7. Moore & Bendix, *Congress, Evidence and Rulemaking*, 84 Yale L.J. 9, 22-23 (1974).

averred, should be considered privileged.

> (1) The communications must originate in a *confidence* that they will not be disclosed.
> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
> (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered.*
> (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.[8]

After qualifying the attorney-client relationship under those criteria, Wigmore further developed the concept of privilege for communications to attorneys:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.[9]

The modern rationale for the attorney-client privilege (dealt with in discarded Proposed Federal Rule of Evidence 503)[10] places intrinsic value on being able to confide in one's attorney. This value inures only indirectly to the client's benefit, however. The real impetus for freedom of consultation, it is averred, is the increased ability of attorneys to act more effectively in the interests of *justice,* not in the interest of the client.[11] (Many cases, however, seem to concentrate more on the interests of the client.) According to *McCormick,* the proper handling of claims and disputes that may eventually lead to litigation requires a certain expertise. This expertise being reserved to attorneys, it is they who must be fully advised of the facts before the litigation process can be effective. The detriment to justice (the fact-finder's ignorance of some truth) that results from denying inquiry into conversations between attorney and client is outweighed by the benefits to justice (not to mention the benefits to the client) in having lawyers operate

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8. J. WIGMORE, EVIDENCE § 2285 (McNaughton rev. ed. 1961) (emphasis in original) (footnotes omitted).

9. *Id.* at § 2292 (emphasis omitted) (footnotes omitted).

10. Proposed Rules, *supra* note 1, at 361-62.

11. C. MCCORMICK, EVIDENCE § 87 (2d ed. 1972).

effectively.[12]

Admittedly, this "officer of the court" theory is based on an unverifiable assumption,[13] but all privileges rest on such assumptions about human behavior. Only if one is willing to discredit or abnegate all such assumptions because of their lack of susceptibility to tangible proof should one be willing to sweep away the privileges that rest on these assumptions.[14] When a rational, well-founded assumption about behavior provides sufficient justification for establishing or expanding a privilege, there should be no hesitation to allow establishment or expansion, provided that doing so will not violate any of Wigmore's four criteria.[15]

The "officer of the court" theory both correlates and conflicts with a rationale behind both the Federal Rules of Civil Procedure and the Federal Rules of Evidence: Full access to information will lead to a more just result.[16] The correlation lies in the encouraging of clients to provide full information to their attorneys, in order that their attorneys be effective advocates.[17] The conflict arises concerning the use of the information garnered—the focus of the privilege, of course, is protection of the information from disclosure, while the focus of the Federal Rules is dissemination of that information.

III. THE PRIVILEGE IN JOINT DEFENSE

Since *Chahoon v. The Commonwealth*[18] in 1871, United States courts have recognized the attorney-client privilege in a joint defense. The general rule for joint defense situations can be stated simply. If individually retained attorneys for codefendants communicate in the furtherance of a joint defense, that communication is privileged. From this basic premise, courts have responded cre-

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12. *Id.*

13. 2 J. WEINSTEIN, *supra* note 1, ¶ 503[02] at 503-15 to -16.

14. Doubt about the justification for some long-standing, traditional assumptions seems to have led to narrow judicial construction of some privileges and a concomitant hesitation to recognize new privileges. *See, e.g.*, Herbert v. Lando, 441 U.S. 153 (1979); United States v. Nixon, 418 U.S. 683 (1974). This doubt also led to the absence of a provision for a general physician-patient privilege in the 1973 Proposed Federal Rules of Evidence. *See* Proposed Rules, *supra* note 1, at 367-68.

15. 8 J. WIGMORE, *supra* note 8, at § 2285.

16. "Mutual knowledge of all the relevant facts . . . is essential to proper litigation." Hickman v. Taylor, 329 U.S. 495, 507 (1947); *see* D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 207 (1978).

17. The "access to information" theory is especially compelling in the context of joint defense. See text accompanying notes 11-12 *supra*.

18. 62 Va. (21 Gratt.) 822 (1871).

atively in recognizing the exigencies of joint defense, applying the rule to quite diverse sets of facts in a continual accommodation of the tension between the search for truth in the courtroom and the need to preserve a socially preferred relationship. *Chahoon* officially acknowledged an increasingly common fact about litigation today: codefendants need to pool their resources to present the best defense. Proposed Federal Rule of Evidence 503(b)(3)[19] is another verification of the necessity for some sort of privilege in joint defense situations.

According attorney-client privilege in these situations is logically consistent with the modern rationale for the attorney-client privilege. If the privilege exists to promote full disclosure of the truth between a client and his attorney, the purpose is not impaired by merely multiplying the number of truth-tellers and confidence-receivers (the result of an extension of the privilege to joint defense). Full disclosure of the truth between client and attorney was said to increase the effectiveness of the administration of justice. This part of the rationale provides compelling reason to extend the attorney-client privilege to joint defense. In many cases, the best defense depends on pooled information that allows complete and proper appraisal of every defendant's situation. Without shared, privileged information, the effectiveness of a defense is hampered, leading to possibly unjust results.

> The privilege is, after all, born of the law's own complexity. The layman's course through litigation must at least be evened by the assurance that he may, without penalty, invest his confidence and confidences in a professional counsellor. . . . That assurance is no less important or appropriate where a cooperative program of joint defense is helpful or, *a fortiori*, necessary to form and inform the representation of clients whose attorneys are each separately retained.[20]

The attorney-client privilege currently extends to any communication made in order to facilitate the rendition of legal services to a client, "irrespective of litigation begun or contemplated";[21]

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19. Proposed Rules, *supra* note 1, at 362-64. Proposed Fed. R. Evid. 503(b)(3) noted that a frequent reason for various clients to retain different attorneys was the possibility of potentially conflicting interests in addition to the common binding interest between the parties. The needs of these cases seemed to be better met by allowing each client a privilege for his own statements in such cases when different lawyers represent clients who have some interests in common.

20. *In re* Grand Jury Subpoena Duces Tecum, Nov. 16, 1974, 406 F. Supp. 381, 388 (S.D.N.Y. 1975).

21. 8 J. WIGMORE, *supra* note 8, at §§ 2294-2295.

similar parameters seemingly should apply to joint defense situations. There is an obvious anomaly here, however: cases speak of joint "defense," but how can there be a defense if there is no current or proposed suit against the cooperating parties? *SCM Corp. v. Xerox Corp.*,[22] discussed below, makes the extension to a nonlitigation setting. The basis for that court's broad construction of the general rule of privilege is a commonsense recognition that legal advice is as much sought to avoid litigation as to conduct litigation. Indeed, in terms of social and legal policy, staying out of court is more desirable than litigating. It would be anomalous to recognize a privilege that protects only communications that stem from a failure to maintain the more desirable course, withholding protection from those who manage to achieve the very behavior society ostensibly promotes. The same reasoning applies to codefendants, or more properly in this context, to clients with common interests.

The few cases that have applied the attorney-client privilege to joint "defense" deal with four general questions, yielding a rough outline of the parameters of the rule:

1) Who are the *participants* in the communication?
2) How do the *interests* of the participants correlate?
3) *When* is the communication made?
4) What is the *scope* of the privilege?

A. *Who are the Participants?*

The context of the privilege that most readily comes to mind is that of exchanges between attorneys. For instance, in *Continental Oil Co. v. United States*,[23] attorneys representing two corporations exchanged confidential memoranda concerning interviews with employees of both companies who had testified before a grand jury. Counsel for each company argued that the exchange was made in order that they might more effectively represent their clients during the grand jury investigation and at the resulting trial. The attorney-client privilege formed the basis for upholding a motion to quash subpoenas duces tecum served upon the two attorneys.

In *State v. Emmanuel*,[24] the privilege was extended to statements made by one defendant to his codefendant's lawyer in the

22. 70 F.R.D. 508 (D. Conn.), *appeal dismissed*, 534 F.2d 1031 (2d Cir. 1976).
23. 330 F.2d 347 (9th Cir. 1964).
24. 42 Wash. 2d 799, 259 P.2d 845 (1953).

presence of the speaker's attorney for the purpose of obtaining legal advice in preparation of a common defense. The court found that the statements "were intended to be confidential at least as to third persons not present at the conference."[25] *Pettibone Corp. v. Caterpillar Tractor Co.*[26] confirmed that direct communication between a defendant and his codefendant's attorney, in the presence of the speaker's attorney, is covered by the privilege.

The Court of Appeals for the Seventh Circuit, in *United States v. McPartlin*,[27] recently applied the privilege to statements made to an *agent* of the codefendant's attorney in the absence of the speaker's attorney. Codefendants in this fraud case had a common interest in discrediting the government's key witness. An investigator for defendant *A* twice interviewed defendant *B*, with the permission of *B's* lawyer, to gain information in furtherance of that common interest. At trial, *A* attempted to offer *B's* statement into evidence to support *A's* defense. The court sustained *B's* objection because the statements were made in confidence to his codefendant's attorney for a common, defensive purpose. The court pointed out that shared information "can be necessary to a fair opportunity to defend" in criminal cases.[28]

In *Hunydee v. United States*,[29] a new actor appears—the other defendant. In this landmark decision, a husband *(H)* and wife *(W)* were indicted on charges of income tax evasion. Because of a possible conflict of interest, each defendant retained a separate attorney, but all met together to discuss common issues of their defense. In front of *H's* attorney, *W*, and *W's* attorney, *H* agreed to plead guilty in order to exonerate *W*. The court would not allow *W* or her attorney to testify to *H's* admission, holding that his statement was within the attorney-client privilege. "These statements apprised the respective attorneys of Hunydee's position at that time and influenced the course of their representation."[30]

So far, there has been no case concerning direct defendant-to-defendant communication. Presumably the result in *Hunydee* would be the same if, instead of answering his attorney's question, he had answered *W's* question in the presence of one or both attor-

25. *Id.* at 815, 259 P.2d at 854.

26. 2 Trade Cas. (CCH) ¶ 75,419 (D. Neb. 1974).

27. 595 F.2d 1321 (7th Cir. 1979), *cert. denied*, 444 U.S. 898 (1979).

28. 595 F.2d at 1336. Note that courts have not distinguished between criminal and civil actions when applying prior cases as precedent or when offering a rationale for the existence of the privilege.

29. 355 F.2d 183 (9th Cir. 1965).

30. *Id.* at 185.

neys. It would be a very fine line, indeed, that would distinguish between comments made directly to either attorney and comments merely made in their presence but directed to a codefendant. The Federal District Court, Southern District of New York, interprets *Hunydee* as confirming that clients' direct communication would fall within the comprehension of the rule.[31] Proposed Federal Rule of Evidence 503(a)(4),[32] read together with subsection 503(b)(3),[33] further supports this contention. In his analysis of these two subdivisions, Weinstein infers that "inter-client communications are protected if the communication refers to a matter of 'common interest'."[34]

Nevertheless, the better and safer practice, Weinstein points out, is not to have clients at attorneys' conferences, such as those discussed herein, because they may make extraneous statements which can be taken as admissions.[35] Often, however, a conference with clients present is necessary.[36] Under *Hunydee*,[37] despite Weinstein's warning, careful structuring of the conference can fully protect clients. They might be fully protected even without careful structuring if the *Hunydee* rationale continues to be extended as it was in the Southern District of New York.

B. *What are the Interests of the Participants?*

The precedent-setting *Chahoon* case[38] is the archetypal joint defense situation. Three defendants met with two attorneys concerning their joint defense. The interests of all three defendants were congruent, since they had been indicted for the same offenses.[39] Such total identity of interest is not required in every cir-

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31. *In re* Grand Jury Subpoena Duces Tecum, Nov. 16, 1974, 406 F. Supp. at 388.

32. "A 'representative of the lawyer' is one employed to assist the lawyer in the rendition of professional legal services." Proposed Rules, *supra* note 1, at 361.

33. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, . . . by him or his lawyer to a lawyer representing another in a matter of common interest. . . .

Proposed Rules, *supra* note 1, at 361-62.

34. 2 J. WEINSTEIN, *supra* note 1, ¶ 503(b)[06], at 503-60.

35. *Id.* at 503-52.

36. *See generally* 406 F. Supp. 381.

37. 355 F.2d 183 (9th Cir. 1965).

38. 62 Va. (21 Gratt.) 822 (1871).

39. The Commonwealth introduced the testimony of a codefendant to establish incriminating statements made by defendant Chahoon at the conference. Chahoon attempted to examine the codefendant's attorney about what had transpired at the conference to refute the testimony. The attorney asserted the attorney-client privilege. The court held that since all three defendants had the same defense, communication to any counsel at the meeting

cumstance in order for the privilege to survive.[40] For instance, in *Schmitt v. Emery*,[41] a suit stemming from the collision of two cars and a bus, the defendant bus driver made a statement for the defendant bus company in anticipation of litigation, which the company then gave to its attorney. When plaintiff subpoenaed the driver's statement, the bus company's attorney gave a copy of the statement to attorneys for two other defendants. This exchange was found not to be a waiver of the attorney-client privilege between the bus company and its attorney, because the purpose of furnishing the copy was not to disclose its contents, but rather to aid all the defendants in their efforts to exclude the statement. The privilege applied in spite of the varying reasons the defendants had for wanting to exclude the statement.[42]

> The copy is given and accepted under the privilege between the attorney furnishing it and his client. For the occasion, the recipient of the copy stands under the same restraints arising from the privileged character of the document as the counsel who furnished it, and consequently he has no right, and cannot be compelled, to produce or disclose its contents.[43]

The privilege applies when a limited common purpose necessitates disclosure and therefore negates implications of waiver. *Schmitt* thus firmly established the validity of limited use of the attorney-client privilege among defendants in civil litigation.

The reality of joint defense—namely, that defendants' interests often coincide only on certain issues—was again recognized in *United States v. McPartlin*, a recent case.[44] The claim of privilege arose in the same context as in *Chahoon:* defendant Ingram attempted to introduce a statement that his codefendant McPartlin

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was privileged. In the court's view, the counsel of each was the counsel of all, and all three defendants had to release the attorney before he could testify. *Id.*

40. *Cf.* Vance v. State, 190 Tenn. 521, 230 S.W.2d 987, *cert. denied*, 339 U.S. 988 (1950): *A & B* were jointly indicted. After severance of their trials, *A* pleaded guilty. Before *B's* trial, *B* and his two attorneys requested a meeting with *A* and his attorney. At this meeting, *B* admitted that *A's* confession was true. At *B's* trial, the state was allowed to introduce *A's* attorney to testify about *B's* admissions over *B's* claim of privilege. At the time of the meeting, neither *A* nor his attorney had any interest in the outcome of the conference, *A* having already pleaded guilty; thus there was no common interest and no basis for a joint defense.

41. 211 Minn. 547, 2 N.W.2d 413 (1942).

42. *Id.* Two defendants based their objections on hearsay; the other two defendants (the bus company and the bus driver) based their objection on the attorney-client privilege, which attached when the driver, as the company's agent, communicated with the attorney.

43. 211 Minn. at 554, 2 N.W.2d at 417.

44. 595 F.2d 1321 (7th Cir. 1979), *cert. denied*, 444 U.S. 898 (1979).

made in an interview with an investigator for Ingram's lawyer. The statement was taken in cooperation with Ingram in an attempt to discredit evidence damaging to both defendants, yet it also supported Ingram's defense that payments made by him were not bribes, but were extorted by McPartlin. McPartlin claimed that his statement to Ingram's attorney was privileged. The court's reasoning echoes that of *Chahoon:* when the defendants joined efforts on one part of the government's case, the court stated that "the attorney for each represented both for purposes of that joint effort."[45] The *McPartlin* court rejected the notion that the privilege was limited only to situations in which the positions of the codefendants are compatible in all respects, observing that uninhibited communication among joint parties and their counsel is often important to the protection of each party's own best interest, and that cooperation among defendants also serves to expedite the trial and trial preparation.[46] In dicta, the Seventh Circuit opined that McPartlin was entitled to assert the privilege whether Ingram was tried jointly or separately.[47]

The disposition of issues arising from joint defendants' cooperation only on certain issues or for limited purposes[48] indicates that the presence of other incongruent interests is no barrier to application of the privilege, provided the evidence given during cooperation was given in furtherance of a congruent interest. Indeed, in *Hunydee,*[49] the entire reason for hiring separate attorneys was the existence of a conflict of interest.

Extension of the reasoning in these cases can be seen in *In re Grand Jury Subpoena Duces Tecum, Nov. 16, 1974,*[50] which deals with whether communications between *potential* codefendants are privileged when the government asserts that adversity could potentially exist between them. *In re Grand Jury* specifically concerns individuals who were the targets of an SEC investigation. To establish the groundwork for a cooperative defense to an *anticipated* SEC lawsuit which was later filed, these individuals met together with their attorneys and attorneys for a corporation that would later be named a codefendant. At all times, attorneys and clients

45. *Id.* at 1337.

46. *Id.* at 1336-37.

47. *Id.* at 1337. *See also* discussion of the duration of the privilege at text accompanying notes 103-12 *infra.*

48. *See, e.g.,* United States v. McPartlin, 595 F.2d 1321 (7th Cir. 1979); Schmitt v. Emery, 211 Minn. 547, 2 N.W.2d 413 (1942).

49. 355 F.2d 183.

50. 406 F. Supp. 381 (S.D.N.Y. 1975).

proceeded in the belief that their confidences were protected by the attorney-client privilege because they were being shared in furtherance of their joint defense. Because of the size and complexity of the lawsuit, the attorneys divided their tasks and shared the information resulting from their work. A grand jury, investigating suspected securities manipulations by the corporate defendant, issued a subpoena duces tecum to the corporate defendant's attorneys for production of documents related to the SEC investigation and trial, including those resulting from the cooperation. When the attorneys claimed privilege, the government countered that the privilege had never applied because the corporate client, International Controls Corporation (ICC), might have grounds against its former officer and director, Vesco, who was a codefendant of ICC. On the basis of this potential adversity, the government contended that no joint defense was possible and thus no attorney-client privilege could attach to those portions of documents that reflected Vesco's and ICC's participation in the meetings. The court ruled against the government, stating that even if a later action by ICC against Vesco was foreseeable, "[t]hat alone would not have prevented Vesco and ICC from sharing confidential information for the purpose of a joint defense against the immediate SEC action. . . . That a joint defense may be made by somewhat unsteady bedfellows does not in itself negate the existence or viability of the joint defense."[51] Thus, the existence of a potential, and even probable, adverse relationship does not destroy the efficacy of the privilege. Vesco was entitled to risk-sharing confidences with his present codefendants, including ICC, and their lawyers, to strengthen his immediate defense. The *In re Grand Jury* court, it should be noted, assumed that the privilege would be lost in later litigation between ICC and Vesco.[52]

This last assumption was based upon an analogy to the settled principle that if two or more clients consult with one attorney concerning their joint interest and if the clients later have a falling-out that results in a lawsuit instituted by one against the other, the attorney-client privilege protecting their original consultation is inapplicable in the resulting litigation.[53] Subsequent adverse positions make the privilege inapposite, since it is apparent that neither client can reasonably deny the other the use of information

51. *Id.* at 392.
52. *Id.* at 386.
53. C. McCormick, *supra* note 11, at § 91.

that he gave to him.[54]

If each defendant has his own attorney and confidences are shared in planning a joint defense, is the risk that one defendant will later sue the other greater than the risk that one joint client will sue the other? If the answer is no, as is surely the case, then the analogy between the two circumstances is a true one; subsequent litigation *inter sese* would destroy the attorney-client privilege.

What if a third party later institutes litigation against one codefendant and requests evidence from his fellow codefendants? When a third party sues a former defendant, and the former codefendant merely cooperates by acting as a witness for the third party, the attorney-client privilege will prevent the former codefendant from testifying about evidence gained from the former defendant during cooperation in their joint defense effort. Even motives for testifying, such as ill will (or adverse interests) that arose between the former defendants will not destroy the privilege.[55] In *State v. Archuleta,*[56] an individual agreed to testify for the state in the perjury trial of his former fellow codefendants. The state tried to claim the privilege, to avoid introduction of evidence that would impeach its witness. The court suppressed the evidence since this was not litigation between former codefendants, but litigation between the state (a third party) and the codefendants. The witness was not a party to the action and could not alone destroy the privilege.

The *In re Grand Jury* court,[57] it will be remembered, was faced with a grand jury subpoena duces tecum directed to attorneys for a corporation that had been a codefendant in an SEC action. The subpoena requested evidence which had been obtained in cooperative interaction with other defendants to that action. Applying *Archuleta,* the court in *In re Grand Jury* held that because the litigation at bar was between the grand jury (a third party) and the defendants, not between former codefendants, the privilege still attached to the subpoenaed documents. The court's reasoning is compelling:

> [T]o allow such disclosure would so further erode the privilege's protection as to reduce joint defense to an improbable alternative. How well could a joint defense proceed in the light of each

54. 8 J. WIGMORE, *supra* note 8, at § 2312.
55. *See* State v. Archuleta, 29 N.M. 25, 217 P. 619 (1923).
56. *Id.*
57. 406 F. Supp. 381.

> co-defendant's knowledge that any one of the others might trade resultant disclosures to third parties as the price of his own exoneration or for the satisfaction of a personal animus? The attorney-client privilege, carved out to ensure free disclosure between client and counsel, should not thus be whittled away.[58]

At the time of the writing of the *In re Grand Jury* opinion, ICC had two actions pending against Vesco.[59] Despite this demonstrated adversity of interests, latent at the time of the conference at issue, but patent at the time of decision, the court still found the privilege to obtain against third parties, making clear both the correlation to the privilege enjoyed by the single attorney with a single client, and the court's refusal to use 20/20 hindsight in making a determination of privilege.

In re Yarn Processing Patent Litigation[60] takes the attorney-client privilege in joint defense farther than the leading cases. In this patent-infringement suit, upon plaintiffs' motion to compel production of documents that had been disclosed by one defendant to two other defendants, the court commented that its finding of a community of interest among defendants "does not, of course, constitute a prejudgment on the [codefendants'] relationship insofar as it may be at issue in other phases of this litigation."[61] It is apparent that this court realized that antagonistic interests might surface in the litigation, yet it was willing to recognize a privilege in a limited area despite the codefendants' possible adverse stances. This perspicacious court carried its ruling a step beyond even the decision in *In re Grand Jury*;[62] not only is the privilege good despite possible adversity in later separate litigation, but it is good even when codefendants may be antagonistic in other phases of the litigation at issue. This is more than a recognition of "limited purpose" joint defense; it is an acknowledgement that defendants can and must play different roles vis-a-vis one another, according to the exigencies of the lawsuit, and has implications for the defendant who later cross-claims against a cooperating codefendant.[63]

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58. *Id.* at 394.

59. *Id.* at 393.

60. 177 U.S.P.Q. (BNA) 514 (S.D. Fla. 1973).

61. *Id.* at 514.

62. 406 F. Supp. 381.

63. *See* text accompanying notes 113-25, *infra*.

C. *When Is the Communication Made?*

The timing of the communication for which privilege is later sought is important in two respects. First, application of the privilege may hinge on the stage of the relationship between the attorney and the client. In the typical case,[64] each defendant who has been indicted or against whom a complaint has been filed retains his own attorney before it becomes apparent that joining forces in conducting a defense is the wisest course.

Nevertheless, *In re Grand Jury*[65] establishes that a formal retainer is not a prerequisite to applying the privilege. There a group of defendants and their lawyers met with potential codefendants. The potential codefendants, who had not yet retained their own attorneys, were allowed to claim privilege to protect their statements at the meeting. This ruling complies with the established principle that pre-retainer conferences may be privileged in single attorney-client relationships.[66] It is equally necessary for informal attorney-client relationships in joint defenses to be subject to the privilege. If they are not, a potential or actual codefendant could not reap the benefits of joint consultation unless he had first formally retained counsel. For example, if he did not formally retain counsel and it became apparent later in the trial preparation that he needed independent representation, not only could he not use the privilege to protect any statements he had made to that date, but at trial his codefendants could not claim the privilege to prevent him from revealing his conversations. The context of conversations is often so revealing that without a logical extension of the privilege to pre-retainer conversations, the benefits of the privilege would be emasculated.

The second important aspect of timing concerns the intertwined matters of the clients' relationships with each other and the stage of maturation of the conflict. As stated earlier,[67] the privilege logically should apply to any communication that facilitates the

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64. *See, e.g.*, Chahoon v. Commonwealth, 62 Va. (21 Gratt) 822, and Schmitt v. Emery, 211 Minn. 547, 2 N.W.2d 413.

65. 406 F. Supp. 381.

66. *See* 8 J. WIGMORE, *supra* note 8, at § 2304. Communications with an attorney are protected when a person seeks the benefit of his legal services. The client is protected in his preliminary statements when making the overture, even if the overture is refused. If the attorney indicates that he will not accept the particular person as a client, however, continued communication will not be privileged. The privilege will also not attach if a person knowingly attempts to retain one who is already retained by his opponent. In these situations, he does not need or deserve the protection of the privilege. *Id.*

67. *See* text accompanying notes 22 and 23 *supra*.

rendition of legal services to a client, regardless of the presence or absence of litigation. Indeed, society should encourage legal consultation that allows clients with joint interests to avoid the travail of the courtroom.[68] *SCM Corp. v. Xerox Corp*,[69] the only case to deal with the effect of a nonlitigation setting upon the attorney-client privilege, expresses a similar viewpoint:

> The privilege need not be limited to legal consultations . . . in litigation situations . . . . Corporations should be encouraged to seek legal advice in planning their affairs to avoid litigation as well as in pursuing it. The *timing* and *setting* of the communications are important indicators of the measure of common interest; the shared interest necessary to justify extending the privilege to encompass intercorporate communications appears most clearly in cases of co-defendants and impending litigations but is not *necessarily limited to those situations*.[70]

The court specifically found that common interests in the development of technology and the exploitation of patents were sufficient to require the protection of the attorney-client privilege.

> Whether the legal advice was focused on pending litigation or on developing a patent program that would afford maximum protection, the privilege should not be denied when the common interest is clear. . . . In this setting of joint analysis and cooperative study, the three parties' common interests in patent protection predominated.[71]

Although *Continental Oil Co. v. United States*[72] involved pre-indictment relationships[73] and thus not a purely nonlitigation setting, statements in the opinion by the United States Court of Appeals for the Ninth Circuit underscored the importance of extension of the privilege to *any* stage of a client's dealings with his attorney.[74]

Several cases other than *Continental Oil Co.* and *SCM Corp.* support the application of the privilege when persons, although not codefendants, either potentially are codefendants or have such close relationships as to make the "common interest" test applica-

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68. *See* Note, *The Attorney-Client Privilege in Multiple Party Situations*, 8 COLUM. J.L. & SOC. PROB. 179, 188-89 (1972).

69. 70 F.R.D. 508 (D. Conn. 1976).

70. *Id.* at 513 (emphasis added) (footnotes omitted).

71. *Id.* at 514.

72. 330 F.2d 347 (9th Cir. 1964).

73. *See also* Hunydee v. United States, 355 F.2d 183 (9th Cir. 1965).

74. 330 F.2d at 350.

ble. When a witness in an antitrust suit is reasonably to be considered a member of the class of alleged conspirators and extension of the suit to include the witness is foreseeable,[75] or when clients face indictment on similar charges,[76] the privilege has been applied to protect communication. Factors in some patent cases (based on the attorney's work product) that have overcome the lack of codefendant status have included potential liability of the nonparty if the party lost the suit,[77] and a close business relationship such as partnership.[78]

Transmirra Products Corp. v. Monsanto Chemical Co.,[79] a decision frequently cited in joint defense cases, was based on the work-product doctrine, but its dictum is instructive when one is considering the relationship of a party and nonparty. Plaintiff sued Corporation *X* for patent infringement, discontinued the action, and one month later sued Corporation *Y* on the same allegations, then sought details of any assistance *Y* had given to *X* concerning *X's* defense strategy. Though the action against Corporation *X* did not include Corporation *Y* and the action against *Y* did not include *X*, the court noted that the plaintiff implicitly recognized the community of interest linking the two defendants, since both actions contained conspiratorial allegations as to the concerted activities of *X* and *Y*.[80] This conclusion strengthened the court's determination that the two corporations had a community of interest in the litigation that protected their exchanges of information. The court emphasized that plaintiff could have sued both *X* and *Y* in the same action. At the time *X* was sued, it was obvious to *Y* that it could reasonably expect to be sued also, and that it would inure to *Y's* benefit to cooperate with *X*.[81] "Such interchange is frequently necessary . . . to enable proper appraisal of the conspiratorial acts often alleged in antitrust suits."[82]

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75. *See, e.g.*, Pettibone Corp. v. Caterpillar Tractor Co., 2 Trade Cas. (CCH) ¶ 75, 419 (D. Neb. 1974).

76. *See* Hunydee v. United States, 355 F.2d 183 (9th Cir. 1965), and Continental Oil v. United States, 330 F.2d 347 (9th Cir. 1964).

77. Stix Products, Inc. v. United Merchants & Mfrs., Inc., 47 F.R.D. 334 (S.D.N.Y. 1969).

78. Stanley Works v. Haeger Potteries, Inc., 35 F.R.D. 551 (N.D. Ill. 1964).

79. Transmirra Products Corp. v. Monsanto Chemical Co., 26 F.R.D. 572 (S.D.N.Y. 1960).

80. *Id.* at 579.

81. *Id.*

82. *Id.* (citing Note, *Waiver of Attorney-Client Privilege on Inter-Attorney Exchange of Information*, 63 YALE L.J. 1030, 1030 (1954)).

Although both the policy behind the attorney-client privilege[83] and the special exigencies present in the attorney-client relationships comprised by a joint defensive effort seem to demand extension of the privilege to nonlitigation situations, it is probable that a combination of factors will limit the application of the privilege. The requirements of the test for "common interest" in most instances will be met only when parties face litigation. Also, the stricture inherent in the term "joint *defense*" will provide stumbling blocks to later courts in expanding the reach of the privilege to other cooperative situations and indeed to its logical limits.

D. *What Is the Scope of the Privilege?*

Duration and breadth are the most complicated and least considered aspects of the attorney-client privilege as applied to joint defense. The issue of duration is complicated by the possibility of the parties assuming adverse positions later. This could occur within the same litigation—for instance, codefendants might file cross-claims or they might take opposing stands only on issues[84] in which their interests diverge. The problem could also arise when one defendant later sues another defendant in a separate but related suit,[85] or when a third party sues one defendant and another defendant testifies for the plaintiff.[86] As stated previously,[87] if former clients disagree among themselves and subsequently become opposing parties in a lawsuit the privilege is inapplicable. If the later action is brought by a third party, however, the privilege still applies.[88]

The basis of the privilege in joint defense is unity—unity of interest and unity of defense of that interest. In a joint defense, the attorney for one client becomes the attorney for all on the common issues. Conversely, the client of one attorney becomes the client of all the attorneys for those same common interests. The individual defendants become a unit for purposes of applying the privilege. Because of the hurdles that must be surmounted before the "common interest" test is passed and the unit is formed, it is

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83. *See* text accompanying notes 10-17 *supra*.

84. *See, e.g., In re* Yarn Processing, 177 U.S.P.Q. (BNA) 514 (S.D. Fla. 1973).

85. See, for example, the situation involving Vesco and ICC in *In re* Grand Jury, 406 F. Supp. 381 (S.D.N.Y. 1975), discussed in text accompanying notes 50-54 *supra*.

86. *See, e.g.*, State v. Archuleta, 29 N.M. 25, 217 P. 619 (1923), in which the third party was the government.

87. *See* text accompanying note 53 *supra*.

88. C. McCormick, *supra* note 11 at § 91.

logical that the unity be sustained until some act is performed by one of the defendants to destroy the unit. Merely acting as a witness in a suit brought by a third party should not be considered a sufficiently "destructive" act.[89] Only the finality of an actual suit by one former codefendant against another should be capable of eroding the basis for the privilege and thus the privilege itself. The privilege is not lightly given; neither should action of the court or of one who is benefiting from the privilege easily destroy it. As so cogently explained in *In re Grand Jury*,[90] to view the situation otherwise would so seriously impair the efficacy of joint defense as to vitiate the privilege entirely unless there were no conceivable way for a participant in a joint defense to become the target of a cross-claim or no possibility of his codefendant's being called as a witness in a related action. This last circumstance alone is so improbable as to render the joint defense alternative a nullity.[91]

The logical conclusion, then, is that the privilege should endure as long as the unity of interest that engendered the privilege endures. In general, unity of interest would last indefinitely, or until the former codefendants took affirmative steps to terminate the union—*i.e.*, filed suit one against the other. No case so far deals directly with this problem, but inferences drawn from cases grappling with issues of "limited purpose" joint defenses and the work product doctrine may be helpful.

1. PERSONS WHO MAY CLAIM THE PRIVILEGE

The defendants in *Chahoon*[92] cooperated in preparing a joint defense, but had separate trials.[93] The court established the "unity" requirement when it ruled that since the counsel of each was the counsel of all, release by *all* the codefendants was necessary for any attorney to be able to testify. The former defendant, however, was allowed to testify to an admission of one of his codefendants made during a joint conference.

The Advisory Committee of the Proposed Federal Rules of Evidence has criticized *Chahoon* for requiring the consent of all cooperating defendants in order to release one defendant's attor-

89. *See* State v. Archuleta, 29 N.M. 25, 217 P. 619 (1923).

90. 406 F. Supp. 381 (S.D.N.Y. 1975).

91. *Id.* at 394.

92. 62 Va. (21 Gratt.) 822 (1871).

93. The court implicitly recognized that separate trials were not a bar to application of the privilege. *See* United States v. McPartlin, 595 F.2d 1321 (7th Cir. 1979) for a similar modern view.

ney from the attorney-client privilege.[94] The Committee bases its criticism on the actual or potential conflicts of interest that cause codefendants to hire separate attorneys. The Committee has dealt with such conflicts by drafting a rule allowing "each client a privilege [only] as to his own statements. Thus if all resist disclosure, none will occur."[95] Under the proposed rule, if a client later wished to testify as to his own statements, he could.[96]

The Committee's approach is misguided. Even if their motive was to further the federal courts' interest in admitting additional evidence,[97] "to allow such disclosure would so further erode the privilege's protection as to reduce joint defense to an improbable alternative."[98] If each defendant were free at any time to disclose his own statements, what confidence could his codefendants place in him, knowing that at any moment when his self-interest shifted away from the joint cause, he could tell his tale? How could he tell his tale without intimating "the content of the confidential communication of another, thereby violating the latter's right to prevent discovery"?[99] It would be extremely difficult for a defendant to avoid disclosing the gist of his codefendant's statements while outlining the context of his own statements. The viability of a rule that would allow this result in the absence of head-on conflict (a lawsuit by one defendant against another) is questionable.

Unity of interest, the policy underlying the application of privilege to a joint defense, demands the preservation of unity in the absence of an affirmative act terminating the union. As to attorneys, the *Chahoon* rule requiring the consent of all joint clients before an attorney may testify on matters in which the clients have common interests, is the logical choice.[100] As to clients, one com-

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94. Proposed Fed. R. Evid. 76.

95. *Id.* at 77 (citing Continental Oil v. United States, 330 F.2d 347 (9th Cir. 1964)).

96. One author has suggested that such disclosure could result if the client received immunity and testified for the government in a criminal case. Miller, *The Corporate Attorney-Client Privilege and the Work Product Doctrine: Protection from Compelled Disclosure in Criminal Investigation of a Corporation*, 12 U. S.F. L. REV. 569 (1978). But the *In re Grand Jury* and *Archuleta* cases belie this rationale when the later proceeding is a third party action (*e.g.*, government v. defendant), not one between two former codefendants. *See* text accompanying notes 59-61 *supra*.

97. *See* Comment, *Federal Rules of Evidence and the Law of Privileges*, 15 WAYNE L. REV. 1286, 1312 (1969).

98. 406 F. Supp. at 394.

99. Comment, *supra* note 97, at 1312.

100. There is no irrebutable inference from the conduct of a joint defense, however, that confidences were shared that would bar an attorney from subsequently representing a party opposing a former codefendant. For instance, in Fred Weber, Inc. v. Shell Oil Co., 432 F. Supp. 694, *aff'd*, 566 F.2d 602, *cert. denied*, 436 U.S. 905 (1977), the court refused to

mentator has proposed a hybrid of Proposed Federal Rule of Evidence 503(b)(3) and the *Chahoon* rule:

> A client may refuse to disclose and may prohibit the disclosure of any confidential communications, *or the contents thereof,* made by:
>
> (1) the client, or
>
> (2) his attorney, or
>
> (3) the representative of either;
>
> and communicated to:
>
> (1) another client, or
>
> (2) his attorney, or
>
> (3) the representative of either,
>
> in a matter of common interest to both clients.
>
> Under this rule, a client in joint consultation would retain the privilege as to his own communications, but would be restricted in his disclosure to those communications which did not embody the content of the privileged statements of another client.[101]

This rule allows a defendant to disclose his own statements as long as he does not jeopardize his codefendants' expectations of confidentiality.

2. DURATION

No case thus far has dealt directly with the question of the duration of the attorney-client privilege in joint defense situations. Analogy may be made to opinions that discuss an attorney's work product.[102]

In a multidistrict patent antitrust case,[103] the United States Court of Appeals for the Fourth Circuit held that an attorney's

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disqualify plaintiffs' attorney because evidence showed that no confidential information was received in a prior joint defense.

Wilson P. Abraham Const. Corp. v. Armco Steel Corp., 559 F.2d 250, 253 (5th Cir. 1977) held that an attorney who received confidential information in the conduct of a joint defense breaches his fiduciary duty to the codefendants who were not his clients if he later uses this information in his representation of another client against one of the codefendants.

101. Comment, *supra* note 91, at 1313.

102. The distinction between materials protected by the work product doctrine and information protected by the attorney-client privilege was first enunciated in Hickman v. Taylor, 329 U.S. 495 (1947). Basically, the work product doctrine is an independent source of immunity from discovery, which protects the effectiveness of an attorney's trial preparation. Kirkland v. Morton Salt Co., 46 F.R.D. 28 (N.D. Ga. 1968). The attorney-client privilege is a separate and distinct immunity designed to protect the confidential disclosures between a client and his attorney irrespective of pending or anticipated litigation. *See* C. McCormick, *supra* note 11, at § 87.

103. Duplan Corp. v. Moulinage et Retorderie de Chavonaz, 487 F.2d 480 (4th Cir. 1973).

work product prepared for an earlier, unrelated case is not discoverable in the current case unless the party seeking discovery can meet the requirements of *Hickman v. Taylor*.[104] The policy behind inviolability of work product was found "scarcely less applicable to a case which has been closed than to one which is still being contested."[105] The decision was based not on the "rights or posture of the litigants vis-a-vis each other,"[106] but on the need to protect an attorney's professional effort and preserve the confidential nature of his task, which need "transcends the rights of the litigants."[107] Similarly, the attorney-client privilege in joint defenses continues to be recognized despite later unrelated litigation by a third party against a former codefendant. This recognition is not based on the "rights or posture of the litigants vis-a-vis each other,"[108] *i.e.*, a third party versus a defendant, but is founded on the necessity of protecting the integrity of the earlier unity of confidentiality and cooperation. The litigation that gave rise to confidential association in a common defense may have terminated, but the policy that fosters the privilege—namely, the protection and enhancement of a defendant's efforts to defend himself through the free and confidential exchange of information and ideas with his codefendants and their counsel is nonetheless worth furthering.[109]

Some work product cases allow the reach of the privilege to extend only to later *related* cases,[110] but this eludes the policy of the doctrine by making attorneys hesitant to assemble extensive work product materials because of the concern that the material would not be protected in a later, unrelated case. Similarly, to limit the recognition of the attorney-client privilege in joint defense to cases related to the initial suit would vitiate the privilege, reducing it to "an improbable alternative."[111] Therefore, to provide full protection and allow complete use of the privilege, participants

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104. 329 U.S. 495 (1947). Discovery may be properly had by a party: 1) when relevant and nonprivileged facts remain hidden in an attorney's file, and production of those facts appears to be essential to the preparation of one's case; 2) when witnesses are no longer available or can be reached only with difficulty; and 3) when the party seeking to invade the privacy establishes adequate reasons to justify production through a subpoena or court order. *Id.* at 511-12.

105. 487 F.2d at 483.

106. *Id.*

107. *Id.*

108. *Id.*

109. Compare the situation in which former codefendants end up as adversaries in later litigation.

110. *See, e.g.*, Hercules, Inc. v. Exxon Corp., 434 F. Supp. 136 (D. Del. 1977).

111. 406 F. Supp. at 394.

in a joint defense should be allowed to disclose information received in connection with confidential conferences, only if they become parties adverse to a former codefendant in a lawsuit.

Conflicting rulings on the applicability of the attorney-client privilege in joint defense are bound to arise when there are separate, but concurrent, actions in different jurisdictions, especially in patent or antitrust suits. In *IBM Corp. v. United States*,[112] the government was pressing antitrust actions in New York and in Minnesota. A judge in Minnesota allowed the attorney-client privilege against production of certain documents and issued a protective order. Later, even though apprised of the Minnesota ruling, the New York court compelled production of the same documents. The United States Court of Appeals for the Second Circuit held this an abuse of discretion. Although the case did not concern joint defense, the ruling is equally applicable and provides an appropriate guideline.

3. CROSS-CLAIMS

The thorniest problem remains: What happens to the privilege if cooperating codefendants file cross-claims in the original action? In a literal sense, the parties are still involved in a third-party action; according to the applicable rule, the privilege still obtains.[113] The defendants, however, are adverse parties on the cross-claim; there is no privilege when parties are adverse.[114] No cases deal with this collision between rationales.

One solution is to allow otherwise confidential information into evidence only for purposes of the cross-claim. There are good arguments against allowing this result, the most obvious being certain debilitation of the privilege, the problem that concerned the court in *In re Grand Jury*.[115] Parties would shun participation in a joint defense unless they were quite certain that they would not become the victim of a cross-claim.[116] Also operating against this solution is an assumption that juries cannot or will not discriminate among the different purposes for which evidence is introduced.[117]

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112. 471 F.2d 507 (2d Cir. 1972).

113. *See* text accompanying notes 59-61 *supra*.

114. *See* note 54 and accompanying text *supra*.

115. 406 F. Supp. 381 (S.D.N.Y. 1975). *See* text accompanying note 58 *supra*.

116. That would be an improbable belief. *See* text accompanying note 91 *supra*.

117. *See, e.g.*, Shephard v. United States, 290 U.S. 96, 103 (1933); C. MCCORMICK, *supra* note 11, at § 59.

A question of waiver also arises. If a defendant/cross-claimant testifies about his own privileged statements, he waives his privilege in the disclosed statements.[118] Additionally, his testimony on direct examination on only a portion of the privileged conversations thereby waives his privilege on the balance of the privileged communication.[119] Even though the testimony concerning a part of the privileged communications was allowed in, only for the limited purpose of advancing the claim of the defendant/cross-claimant, the general rule above would seem to allow the original plaintiff to require testimony on the remainder of the privileged information for the plaintiff's use in his case-in-chief. Such testimony might well be injurious to joint defendants who have effected no such waiver. The availability of the defendant/cross-claimant's testimony would certainly nullify the utility of participation in a joint defensive effort.

A more acceptable solution is preclusion or severance of the cross-claim. Cross-claims are not mandatory, but may be brought later as independent actions.[120] If, after cooperating in a joint defensive effort, a defendant who wished to press a cross-claim against a codefendant were precluded within the original action from using information gained from privileged joint conferences, his options would be (1) to attempt to pursue the cross-claim without the benefit of the privileged information or (2) to bear the extra expense and effort of a separte action to be instituted after the conclusion of the current litigation, when he would be allowed to use the information to his advantage. It is also probable that a severance would be granted in most cases on motion of the claimant's co-defendants, to prevent prejudice.[121] Preclusion, therefore, would be no more onerous an imposition than severance.

Weighing against mandatory preclusion or severance of the cross-claim are the inherent risks any litigant must assume. Each plaintiff or defendant bears the risk that other parties might bring related actions against him, either as future independent lawsuits or as cross-claims or counterclaims. The threat of future litigation becomes simply another tactical consideration for the defendant in his decision to join forces and pool information in order to bolster his defensive efforts against the original plaintiff. This situation was recognized in *In re Grand Jury:*

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118. C. McCormick, *supra* note 11, at § 93.
119. *Id.*
120. *See* Fed. R. Civ. P. 13(g) and comparable state provisions.
121. *See* Fed. R. Civ. P. 42(b) and comparable state provisions.

> Those confidences might have placed Vesco at his peril in the event that a private action were eventually instituted by ICC. Nevertheless, assuming *arguendo* that such peril was anticipated and appreciated by Vesco and his counsel, Vesco was entitled to risk it for the sake of strengthening his immediate defense by cooperation from and with ICC and the other co-defendants.[122]

The question still lingers, however, whether a defendant should be forced to "risk it" or to forego the benefits of a joint defense that might be "necessary to form and inform the representation of clients. . . ."[123]

Facilitating the goal of full disclosure is certainly imperative.[124] Only definitive standards will promote a desirable climate for full use of the joint-defense privilege. To achieve these goals, courts should keep the tactical aspects of joint defense to a minimum by precluding the filing of cross-claims by cooperating codefendants, or by requiring mandatory severance because of the innate prejudice to the cross-claimant's codefendants.

One might argue that preclusion or severance may be too harsh when defendants have cooperated on only one item of evidence or one narrow issue;[125] the amount of privileged information, under those circumstances, can be so slight in proportion to the admissible evidence as to make a separate trial too onerous. If, however, a cross-claimant is allowed to testify about privileged communication, even with disclosure restricted to information pertinent to the cross-claim, the probability of injury to the codefendants is great enough to prevent any cooperation, even as to very limited aspects of the defense.

IV. CONCLUSION

The policy that supports the attorney-client privilege is twofold: furtherance of justice and protection of the client's interest. Extending the privilege to all who formulate a joint defense is logical. This paper has surveyed the efforts of courts to make such an extension and has suggested ways to deal with situations not yet encompassed by judicial decision.

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122. 406 F. Supp. at 392.

123. *Id.* at 388 (emphasis added).

124. *See, e.g.*, Comment, *supra* note 97, at 1312; Note, *The Attorney-Client Privilege and the Corporation in Shareholder Litigation*, 50 So. CAL. L. REV. 303 (1977).

125. *See, e.g.*, Schmitt v. Emery, 211 Minn. 547, 2 N.W.2d 413.